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Our ref: 488494
Your ref: TR030001



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BY EMAIL ONLY

Dear Secretary of State for the Department for Transport,

Consultation: Proposed application under Article 7 for the extension of time for completion of work associated with the Able Marine Energy Park Development Consent Order - TR030001

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Thank you for seeking our advice on the proposed 7-year time extension to the Able Marine Energy Park Development Consent Order (DCO). As your Authority will be aware we have advised in our consultation responses (dated 06 June 2024 and 13 August 2024) on the environmental risks that remain outstanding areas of concern to Natural England from this proposal. We welcome the Applicant's responses to the points we raised and note their comments. We will continue to work with the Applicant to address these.

Following your consultation on 17 September 2024 on a further three documents, we provide further advice below. The three documents are:

1. *Habitats Regulations Assessment – Alternative Solutions and IROPI* (dated 10 September 2024)
2. *HRA Part 5 compensation measures* (dated September 2024)
3. *Applicant's response to Natural England's comments on 13 August 2024* (undated, but uploaded to PINS portal on 17 September 2024)

As there are a number of documents, we have re-structured our comments to discuss them in the order of the Habitats Regulations and sequential tests of the derogations process.

Natural England's Overarching Position

Natural England provides the following advice without prejudice, as we note your Authority has not made a decision on the Appropriate Assessment, Alternative Solutions and Imperative Reasons for Overriding Public Interest tests.

The key theme behind our concerns is to ensure that the compensation/ overcompensation measures are delivered and effective. We note the development has not been achieved within the timeframe of the original DCO and therefore bring to your attention our concerns in the time slippage and how this is accounted for, particularly when this project is regarded as nationally

significant. We seek reassurance that the project will be implemented in reasonable timescales, environmental risks will be minimised as much as possible and that any further extension of time on the permission is avoided in the future.

We respect your role as decision maker in determining the time extension of the DCO, but we encourage you to consider whether additional conditions/requirements are needed to ensure that the project is delivered within reasonable timescales, should you be minded to grant the extension. A requirement could comprise of a detailed timing schedule of when outstanding permissions (e.g. planning permission for overcompensation) and works will commence and be completed. This could further be supported by check points that enable you to be confident that all components of the project will be delivered in reasonable time. This measure would help to alleviate Natural England's concerns, ensuring the required measures will be implemented within reasonable time to manage ecological impacts from the proposal.

Detailed Advice

Habitats Regulations Assessment (HRA)

We note that the Part 2: Information to Inform an Appropriate Assessment (AA) (dated February 2024) has not been uploaded onto the planning portal, although this is still available on the Applicant's website, and we assume that this remains the most up to date version.

Natural England agrees that it cannot be ascertained that the project will not adversely affect the integrity of the European sites 'alone'. We do not intend to provide detailed comments on Part 1 and Part 2 Information to Inform a HRA documents. We highlight that we do not consider that the approach taken is detailed enough to be considered a full re-assessment of the HRA. These documents focus on assessing whether it is likely that there will be significant change in impacts due to a 7-year extension, rather than fully re-assessing the potential impacts of the project to the European sites within the new timescales. It is currently unclear which baseline should be used for this project. Baseline data were collected as part of the original assessment and the surveys were updated for the Material Change 2 (MC2) application. The Part 1 and Part 2 Information to Inform a HRA documents refer to further updates to the baseline from the MC2 for the bird data. We highlight that there should be clarity on which baseline is used when assessing the potential impacts to the European sites in the HRA, ultimately to demonstrate that the compensation measures will remain appropriate. We have included a summary of the predicted habitat loss and of Natural England's previous advice regarding the scale of the ecological impacts on SPA birds in Annex 1 for your reference.

In-combination assessment

As raised in our previous response on 06 June 2024, we consider that the applications for Project Gigastack (PA/SCO/2022/13), Immingham Eastern Ro-Ro Terminal (IERRT) Nationally Significant Infrastructure Project (NSIP) and Immingham Green Energy Terminal (I-GET) NSIP should be assessed within the HRA alongside the updated list of plans/projects at 5.1 of Part 1: LSE Test and 11.1 of the Part 2: Information to Inform an AA (both dated February 2024). Project Gigastack remains at an early project stage and there is still no detailed assessment of the project in the public domain, therefore we agree it is not possible to undertake an in-combination assessment at this time. This should be recorded in the HRA.

As it cannot be ascertained that the project will not adversely affect the integrity of the European sites 'alone', it is possible that an in-combination assessment is not needed. However, we advise that it should be established whether there could be any interactive/ synergistic effects with these additional projects in-combination, which were not taken into account in the original HRA. In particular, we consider that this should focus on whether there could be bird disturbance occurring over a wider area during the same time period, which could impact the Humber Estuary bird populations on a wider scale and present additional impacts to those identified from the project

alone. We consider that this position aligns with that taken by the Secretary of State during the court case for the Humber Sea Terminal¹.

We note that the Applicant has provided their assessment of the three projects that we have listed. Regarding, IERRT and I-GET, Natural England advises that the limited information provided in the Applicant's response to Natural England's comments on 13 August 2024 would not be sufficient to assess potential in-combination effects for these projects. The Applicant has stated that these projects "are supported by an HRA which found no in-combination effects with AMEP". We do not consider that this justification is sufficient in this case, because the in-combination assessments for these two projects did not take into account the currently proposed time extension application for the AMEP DCO.

Therefore, our advice to your Authority is that it should be established whether there could be any interactive/ synergistic effects with these additional projects in-combination, to determine whether an in-combination assessment is necessary. However, the decision on which plans and projects should be included and the level of detail required is a matter for the judgement of your Authority.

Alternative Solutions and Imperative Reasons for Overriding Public Interest (IROPI)

It is not a requirement of the Habitats Regulations that a competent authority must seek the advice of the statutory nature conservation body when it is considering the case for IROPI for a potentially damaging plan or project. Natural England to date has not provided any specific comments on these tests for this project. Should you wish us to provide specific comments then we would be happy to do so. But note our advice will be limited to advising on the acceptability of any alternative solutions in terms of comparing the potential impacts on/ damage to site integrity of the European Sites in question at alternative sites and describing the wider national conservation importance of the affected feature(s) to set the predicted adverse impacts (whether alone or in-combination) of the plan or project under assessment in a wider conservation context.

Compensation measures

The compensation measures remain the same as those proposed and agreed during the original Examination, therefore, we have not provided comments on the details of the compensation scheme. Based on the conclusions of the MC2 HRA, Natural England overall considers that the compensation measures are likely to remain appropriate with the context of the proposed time extension. However, we wish to highlight some key risks regarding the compensation in the context of the proposed time extension only. These are the same overarching points (points 1 to 5) as those identified in our letter dated 06 June 2024, but with further details in response to the *Applicant's response to Natural England's comments on 13 August 2024* document.

- 1. Compensation and overcompensation site habitat has not yet been delivered. If a time extension were granted, there is opportunity to reduce the environmental risk of time lag in compensation habitat becoming functional. Detail should be provided to demonstrate that the minimisation of these environmental risks has been considered within the proposed new timescales for the project.**

Government (Article 6(4)) guidance² sets out that "compensatory measures should usually be in place and effective before the negative effect on a site is allowed to occur". In the Secretary of State's decision letter (dated 18 December 2013) he stated that "some time lag would be acceptable, but this should be minimised". It was agreed that overcompensation measures (in particular creation of wet grassland habitat) would be required to reduce the environmental risks associated with the time lag between the compensation habitat being created and becoming

¹ Humber Sea Terminal Ltd v Secretary of State for Transport [2005] WWHC 1289 (Admin).

² [Habitats regulations assessments: protecting a European site - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/habitats-regulations-assessments-protecting-a-european-site)

functional/ effective.

Whilst we respect the decision made by the Secretary of State at the time, our view is that as part of this application for a 7-year time extension, this position should be re-examined to determine whether within the new timescales proposed, there is opportunity that the environmental risks could be further minimised. Natural England has advised and continues to advise that it believes that the time lag, and therefore its associated risk, could be further reduced by creating Cherry Cobb Sands wet grassland (overcompensation site) as soon as practicably possible, and at the latest commenced 7 months prior to the construction of the quay. Natural England highlights that the Secretary of State at the time, also agreed with this in Annex 1 of his decision letter at paragraph 39 saying “he notes also that further reduction of the risk would be possible by starting work on the Cherry Cobb Sands Wet Grassland Site earlier”.

Whilst we note that the timescales for creation of the compensation are clearly set out in the DCO at Schedule 11, Requirement 21, there are no Requirements in the DCO related to the creation of (and therefore timing of the creation of) the overcompensation habitats.

We acknowledge the Applicant’s comments that by extending the timescale of the DCO for development to commence this doesn't alter the risk of the time lag, however we seek reassurance that the opportunity to minimise this risk even further is considered. Therefore, our advice to your Authority is that updated timescales for the project should be provided, which clearly set out when the overcompensation habitat will be created.

Further details on the background to this environmental risk are set out in Annex 2.

2. Potential delay in provision for any compensation habitat required for works currently being undertaken associated with the pumping station.

Natural England has reviewed the comments made by the Applicant on this point, however, we maintain the position we set out in our previous advice, that it is currently unclear whether compensation is required for the pumping station works by itself. As the Applicant has shown in their comments, there have been a number of decisions made around the pumping station works by different Competent Authorities. The Environment Agency assessed the impacts from the pumping station works in their HRA for the environmental permit and Natural England agreed with their conclusions that it could be ascertained that the project would not adversely affect the integrity of the European sites. However, since then we have been consulted on a Marine Licence application to change the pumping station outfall construction methodology (MLA/2023/00436), we consider that this introduced additional impacts on the European sites to those assessed by the Environment Agency.

We highlighted in our letter (dated 23 April 2024) to the Marine Management Organisation (MMO) on the marine licence application that “whilst we concur with the conclusion of your HRA for this application, our advice is based on the understanding of your view on considering the environmental baseline being that as would be present with development undertaken through the DCO.” The MMO’s view was that the baseline considered the environment under the premise of the existing permission, i.e. with habitat loss in the area already consented.

As no compensation habitat has been provided yet, we consider a 7-year time extension potentially introduces a new risk to that raised with MMO, as it would mean that the provision of compensation for the habitat loss associated with the pumping station works (if needed) would be delayed.

As per our advice to the MMO, we advise that your Authority should satisfy itself that, in the event that the quay is never constructed, sufficient assessment of the impacts of the pumping station has been undertaken to ensure that any appropriate compensatory measures will be provided, if required.

3. Uncertainties remain around the ability to commence works on the overcompensation habitat as soon as practicably possible, as planning permission for the re-design of Cherry Cobb Sands overcompensation site has not yet been granted.

Natural England's advice remains that there is an outstanding risk associated with the inability to commence works on the overcompensation habitat until the planning permission for the re-design of the site is granted. We have responded to East Riding of Yorkshire Council confirming that we have no objections subject to mitigation measures being implemented for the planning application for the re-design of Cherry Cobb Sands wet grassland overcompensation site and note that the Local Planning Authority have an internal target date for a decision of 25 October 2024. Therefore, this risk may be addressed within the next month, should the planning permission be granted.

Whilst we note that there is existing planning permission for a previous design of the wet grassland site, under the current permission there is no freshwater source secured, and therefore it is unlikely that the habitat would be fully functional as it would be too dry.

4. Outstanding matters to be agreed remain regarding the criteria for success of the compensation site (benthic invertebrate prey targets).

Natural England welcomes the Applicant's commitments to undertake the modelling work to determine the criteria of success of the compensation site. However, we seek further reassurance of when this would be undertaken. This could be provided by setting out the timescales for when the Compensation Environmental Management and Monitoring Plan (CEMMP) will be updated to include all this information. This would provide increased certainty as this document informs the audit trail for monitoring success of the compensation.

5. The proposed extension creates uncertainties around whether there could be further potential changes in the habitats and species that require compensation, since the examination. We advise that Appendix UES11-2 Change in Habitat Losses Within the Designated Site (dated 21 June 2021), set out for material change 2 should be updated to reflect the proposed 7-year extension. The CEMMP should also be re-assessed to ensure that it remains fit for purpose.

Natural England considers that the proposed 7-year time extension would introduce additional uncertainty into the reliability of the environmental assessment conclusions. In relation to earlier comments regarding the baseline, it should be noted that some baseline ecological surveys are becoming increasingly out of date. We highlight that Part 1 and 2 Information to Inform a Habitats Regulations Assessment documents only provide updated data on bird surveys, the rest of the data used to inform the assessment was either collected during the MC2 application or is older.

Natural England maintains the position set out in the previous letters that the proposed time extension creates uncertainties around whether there could be further potential changes in the habitats and species that require compensation, since the Examination. We highlight that there have already been habitat changes since the Examination, which were re-assessed as part of the MC2 application and set out in Appendix UES11-2 Change in Habitat Losses Within the Designated Site (dated 21 June 2021). Whilst we acknowledge that there are unlikely to be significant changes in habitat and species' distributions since the MC2 consultation, when the habitat and species data were re-assessed, we consider that with the proposed 7-year extension, there could potentially also be roughly up to a 10-year gap between when the data was collected and when the habitat loss occurs. It is important to have an accurate audit trail of habitat losses and gains related to the development. Therefore, we advise that Appendix UES11-2 should be re-assessed to reflect the proposed 7-year extension. The CEMMP should also be re-assessed to ensure that it remains fit for purpose.

Summary

We have highlighted the environmental risks that we consider are still outstanding, and areas for your further consideration as part of the environmental assessment. We seek reassurance that the project will be implemented in reasonable timescales and that further extension of time on the permission is avoided in the future, as well as ensuring that any environmental risks are minimised as much as possible. If any part of our advice letter is unclear, we would be more than happy to discuss the details of our advice with your Authority.

For any queries relating to the specific advice in this letter please contact Hannah Gooch at [REDACTED] or [REDACTED]. For any new consultations, please send your correspondence to [REDACTED].

Yours sincerely

[REDACTED]
Yorkshire and Northern Lincolnshire Area Team
Natural England

Annex 1

Scale of ecological impact – Summary of habitat losses

Table 1 summarises the habitat losses that will result from the proposal, which has led to the determination that it cannot be ascertained that the project will not adversely affect the integrity of the Humber Estuary SAC, SPA and Ramsar ‘alone’.

Table 1. Predicted habitat loss from the proposal, re-assessed as part of the Material Change 2 application (Adapted from Table 19 of Part 2: Information to Inform an Appropriate Assessment).

Loss	Habitat Type(s)	Area (ha)
Direct loss - reclamation to construct quay	1130 Estuaries	10.4
	1140 Mudflats and sandflats not covered by seawater at low tide 1310 <i>Salicornia</i> and other annuals colonising mud and sand	31.3
	1330 Atlantic salt meadows (<i>Glauco-Puccinellietalia maritima</i>)	1.9
Indirect functional loss of habitat used by birds through disturbance	1140 Mudflats and sandflats not covered by seawater at low tide 1310 <i>Salicornia</i> and other annuals colonising mud and sand	7.7
	1330 Atlantic salt meadows (<i>Glauco-Puccinellietalia maritima</i>)	4.7
Compensation area habitat change	1330 Atlantic salt meadows (<i>Glauco-Puccinellietalia maritima</i>)	2.0 (will change to mudflat)

Scale of ecological impact – summary of Natural England’s previous advice on impacts to SPA birds

As stated at the time of Examination, Natural England’s most significant concern is for the loss of the area used as a foraging resource for SPA birds. Natural England provided detailed advice regarding impacts to the Humber Estuary SPA, which we set out for your Authority’s reference below. Whilst some of the bird numbers have changed, Natural England maintains this position.

The area of mudflat at Killingholme Marshes is important for more than 5,000 SPA/Ramsar waterbirds thereby demonstrating exceptional ecological functionality in terms of its ability to attract and support high numbers of foraging birds. In particular, the mudflat supports internationally important numbers of black-tailed godwits (peak count 2,566 representing 66% of the entire Humber Estuary SPA/Ramsar population³) in addition to large numbers of seven other species of SPA/Ramsar waterbirds⁴. The high numbers of black-tailed godwits feeding at Killingholme Marshes means that this one area of mudflat meets the qualifying criteria for SPA status in its own right.

It is also recognised that the importance of Killingholme Marshes as a foraging resource is linked to its proximity to a secure roosting site at North Killingholme Haven Pits, and this is considered to be particularly important for black-tailed godwits during their Autumn moult. Therefore, whilst this roost site “will remain undisturbed,” it is agreed by the Applicant that its value as a roosting site may be

³ Informal counts of 3,800 black-tailed godwits at North Killingholme Marshes foreshore, September 2012.

⁴ Two other species – redshank and ringed plover – were present in numbers equating almost 10% of the site population.

lost once the adjacent intertidal foraging habitat is developed.

Thus, the scale of impact reflects the exceptional ecological functionality provided by Killingholme Marshes and the large numbers of waterbirds, particularly black-tailed godwits, which use this area.

Black-tailed godwits migrate to the Humber Estuary to undergo their post-breeding moult, where numbers of passage birds result in the peak SPA count occurring during the autumn. Within the SPA, foraging black-tailed godwit numbers peak at Killingholme Marshes Foreshore, coinciding with peak usage at the adjacent North Killingholme Haven Pits, where foraging birds move to roost. Upon making the return migration from their breeding grounds, these two connected foraging and roosting sites are the preferred locality for black-tailed godwits in the Humber Estuary SPA.

As autumn and winter progress black-tailed godwit numbers decline both at Killingholme and across the estuary as a whole. Presumably, owing to resource depletion, as large numbers of foraging godwits reduce the amount of food available at Killingholme Marshes foreshore. Birds then distribute more evenly across the mudflats of the Humber Estuary or leave the SPA entirely as they move to other estuarine sites elsewhere within the SPA network for the remainder of the winter period.

It is clear that whilst other areas within the SPA can support wintering black-tailed godwits, after their arrival within the SPA and as the period of moult commences these moulting birds seek to exploit the richest resource first. Therefore, during the autumn moult birds congregate at the most favoured site offering a combination of the greatest prey densities available in proximity to a secure roost site.

Black-tailed godwit is listed as 'red' on the British Trust for Ornithology's assessment of Birds of Conservation Concern⁵.

⁵ Stanbury, A., Eaton, M., Aebischer, N., Balmer, D., Brown, A., Douse, A., Lindley, P., McCulloch, N., Noble, D., and Win I. 2021. The status of our bird populations: the fifth Birds of Conservation Concern in the United Kingdom, Channel Islands and Isle of Man and second IUCN Red List assessment of extinction risk for Great Britain. *British Birds* 114: 723-747. Available online at <https://britishbirds.co.uk/content/status-our-bird-populations>.

Annex 2

Further detailed advice and background information on point 1

Regarding the compensation provision of the Regulated Tidal Exchange at Cherry Cobbs Sands, Natural England's position remains the same as that set out during the original Examination (as set out in Natural England's final letter to the Department for Transport associated with the original Examination (dated 15 November 2013) and the appended letter to Able UK Ltd (dated 11 October 2013)⁶) that there is uncertainty around whether a system of regulated tidal exchange (RTE) cells can provide the compensatory mudflat necessary to support an internationally important population of black-tailed godwits as well as large populations of other SPA/ Ramsar waterbirds.

The existing managed realignment sites on the Humber Estuary have been monitored extensively and it is known that creating sustainable mudflat habitat is difficult. Natural England still considers that an RTE has a higher chance of success than a managed realignment breach solution due to the adaptive management that can be carried out. However, given that the RTE remains a novel approach untested at this scale in the UK (and never trialled on the Humber), it is our view that the level of uncertainty regarding the success of the compensation measures is greater in this case, and this remains the same as set out during the Examination.

We note that in our letter dated 15 November 2013, we set out that we considered that with the additional compensation package of the Environmental Management and Monitoring Plans (EMMPs) and the legal agreement between Able UK Ltd and Natural England that the risk is "residual". This is further set out at paragraph 45 of the Secretary of State's decision letter (dated 18 December 2013)⁷.

⁶ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR030001/TR030001-002128-Natural%20England%20%20-%20Submitted%20for%20the%20DfT%20deadline%20of%2015%20November%202013%20.pdf>

⁷ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR030001/TR030001-002225-SoS%20Decision%20letter%20with%20annexes.pdf>